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Supreme Court of the United States

October Term, 1970

69-6

No. 310

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, pursuant to Rule 24(5) of the Rules of this Court, respectfully call the Court's attention to the decision of Mr. Justice Francis T. Murphy of the Supreme Court of the State of New York in *In Re Ruskin (Engelhardt)* (New York Law Journal, October 1, 1970) rendered subsequent to the filing of the petition herein. The decision is set forth in an Appendix to this brief.

In that case, the state court, in contempt proceedings, upheld the right of police officers employed by the City of New York to refuse to answer questions concerning their official duties in the course of an inquiry conducted by the Commissioner of Investigation. The employees' refusal was grounded, as here, upon the constitutional privilege against self-incrimination. The court rejected what it described as the Commissioner's suggestion that

> "this court aid in the coercion and contribute to the effort to induce respondents to surrender their right to silence—by use of its contempt power—in antici-

pation of the protection the court will eventually afford respondents because of the coercive taint to any incriminating testimony." (*infra*, pp. A-6-A-7)

The court explicitly held that under New York Law public employees testifying before the Commissioner of Investigation could not be granted immunity by him and would not "acquire" such immunity. This construction of New York law, including an analysis of the New York Code of Criminal Procedure § 619c, is precisely that set forth in the petition for certiorari herein. It is the construction adopted by District Judge Tuler herein (Petitioner's brief, pp. 27a-37a) and rejected (we believe erroneously) by the Court of Appeals for the Second Circuit herein (Petitioner's brief, pp. 7a-24a).

Respectfully submitted,

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APPENDIX A

Opinion of Justice Francis T. Murphy

NEW YORK COUNTY SUPREME COURT

SPECIAL TERM—PART I

JUSTICE FRANCIS T. MURPHY

IN RE RUSKIN (Engelhardt)—Motions numbered 122 and 166 of the calendar of Aug. 26, 1970, are consolidated herein.

The Commissioner of Investigation of the City of New York petitions for an order, pursuant to CPLR 2308, for the issuance of a warrant directing the sheriff to commit the three named respondents to jail; there to remain until said respondents comply with subpoenas previously served upon them, or are otherwise discharged according to law. Additionally, petitioner seeks the imposition of costs and an assessment of damages.

The respondents are patrolmen of the New York City Police Department, who at all relevant times herein were assigned to Sector A (Adam) of the 18th Precinct in Manhattan. On June 14, 1970, petitioner's office came into possession of five sheets of police memo book paper (Police Dept. Form U.F. 16-10,000-M-701155 [68]) with certain writings thereon. This particular edition of the memo book page was only in use by the Police Department from 1968 to the beginning of 1970. The five sheets contain names of business establishments and premises, all located within Sector A of the 18th Precinct. Alongside the names of these businesses appear various letters and names (i.e., "A&W," "B&B," "Joe" and "Fab"). In addition, listed opposite several names are numerals, some of which are preceded by dollar signs.

The commissioner of investigation asserts his belief that these sheets of memo book paper represent a schedule of payments (known in some quarters as a "pad") made by

the business establishments described thereon to the individual respondents and other police personnel assigned to Sector A of the 18th Precinct. The commissioner notes that the names or nicknames of one or both members of the four radio motor patrol car teams assigned to Sector A since 1968 correspond with the abbreviations listed next to the business establishments.

The commissioner commenced an investigation of this matter, pursuant to the authority granted by section 803 (2) of the New York City Charter. Between July 27, 1970, and July 31, 1970, each of the respondents was examined twice by the commissioner (or his deputy)—once on a voluntary basis and once pursuant to subpoena. On each occasion the individual respondents were represented by counsel. Each respondent was advised of his right against self-incrimination, and was further advised that if he refused to testify or to answer any questions relating to the performance of his employment with the city (see New York City Charter, section 1123). Each respondent was further advised that if he did testify and answer questions, neither his answers nor any information or evidence gained by reason of such testimony could be used against him in any criminal proceeding.

Each of the respondents testified, identifying certain of the entries on the sheets as his own writing, but each respondent further testified that he could not recall when, why, and under what circumstances or for what purposes he had placed his writing on the sheets.

The commissioner contends, with some justification, that these answers were so patently false and evasive as to be equivalent to no answers at all (see Valenti v. McCloskey, 6 N. Y. 2d 390, appeal dismissed 361 U. S. 534; Matter of Foster v. Hastings, 263 N. Y. 311; People v. De Feo, 284 App. Div. 622). The commissioner asks this court to find that these false and unresponsive answers amount to deliberate non-compliance with a subpoena, under CPLR 2308,

and seeks respondents' immediate incarceration until they purge themselves of their contempt. Alternatively, the commissioner requests that an order of compliance be issued directing the respondents to reappear for examination and to give responsive answer to the questions enumerated in his moving affidavit.

Respondents cross-move herein for an order dismissing the petition and quashing the subpoenas. Initially, each respondent contends that his answers were not so false or evasive as to justify any finding of contempt. For the reasons noted hereafter, the court does not reach the question as to whether or not there has been due compliance with the subpoenas.

Respondents contend that the Commissioner of Investigation has no authority to grant any kind of immunity, and, indeed, is expressly prohibited from granting the same by section 619-c of the Code of Criminal Procedure. The respondents contend that since they could not be compelled to give self-incriminating testimony unless granted immunity from criminal prosecution, they cannot now be held in contempt because of their testimony, or lack thereof, before the Commissioner of Investigation.

Upon the consent of all parties, the Patrolmen's Benevolent Association of the City of New York has been permitted to intervene herein as amicus curiae. It joins in respondents' contention that a contempt finding may not be based upon testimony compelled by a legally insufficient grant of immunity. Additionally, the PBA contends that CPLR 2308 is unconstitutional in so far as it permits indefinite incarceration without a trial by jury.

Respondents as public employees are entitled, like all other persons, to the benefits of the Constitution, including the privilege against self-incrimination (see, Gardner v. Broderick, 392 U. S. 273; Garrity v. New Jersey, 383 U. S. 493; cf. Murphy v. Waterfront Commission, 378 U. S. 52, 73). "At the same time, [respondents] being public em-

ployees, subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights*" (Uniformed Sanitationmen's Ass'n v. Commissioner of Sanitation, 392 U. S. 280, 285, (emphasis added). It necessarily follows that the coercion of the threat of incarceration for contempt (like the threat of job forfeiture) may not be employed to induce respondents to forego the privilege of self-incrimination secured by our federal and state constitutions.

Respondents also contend that the type of immunity which must be granted to them is that afforded by this state's immunity statute (Code Crim. Pro., sec. 619-c), which is "transactional immunity"—i.e., a person upon whom statutory immunity is conferred "shall not be prosecuted or subjected to any penalty * * * for or on account of any transaction, matter or thing concerning which he gave answer or produced evidence" (id.) (see, Matter of Gold v. Menna, 25 N. Y. 2d 475, construing this statute and overruling, in part, People v. LaBello, 24 N. Y. 2d 598). The type of immunity the Commissioner of Investigation purported to grant was only so-called "use immunity"—i.e., neither the testimony given nor the fruits thereof could be used in any manner subsequently in connection with a criminal prosecution of the witness. (However, a prosecution with respect to the transaction under inquiry can proceed if based on evidence unrelated to the witness' testimony.) Respondents contend that even if the commissioner were empowered to grant the limited type of "use immunity" that would be sufficient immunity in this state to compel self-incriminating testimony.

The commissioner concedes that neither he nor his deputies are expressly authorized by statute to confer any immunity and are thus barred by the express provisions of section 619-c of the Code of Criminal Procedure

from conferring immunity pursuant to that section. However, the commissioner argues that section 619-c is not here applicable, since that statute is limited by section 619-d to certain criminal proceedings and it does not purport to deal with the proceedings of administrative agencies relating to employee disciplinary matters. The commissioner further contends that complete immunity from prosecution is not constitutionally required in order to compel testimony, "use immunity" being sufficient. That view appears to be correct, at least with respect to the protection against self-incrimination afforded by the Federal Constitution (see, Murphy v. Waterfront Commission, supra).

Respondents argue, however, that section 619-c is the exclusive source of statutory immunity in this state and that such provision indicates that the Legislature has determined that a greater immunity must be afforded under our state constitution than that mandated at the federal level. It would appear that the commissioner is in error in his interpretation of section 619-c. Not only is that section not limited merely to criminal proceedings, but it extends to "any investigation or proceeding where, by express provision of section 619-d * * * or any other statute, a competent authority is authorized to confer immunity * * *." The section further provides that no authority shall be deemed a "competent authority" unless "expressly authorized by statute to confer immunity," and also recites the unqualified directive that "immunity shall not be conferred upon any person except in accordance with the provisions of this section."

It appears to be unnecessary to reach the precise question of whether section 619-c was intended to expand the constitutional protection against self-incrimination beyond that mandated by the Fifth and Fourteenth Amendments in order to determine this proceeding. Accordingly, this nisi prius court declines to determine unnecessary constitutional questions. (For the same reason, this court does

not deem it appropriate to reach the PBA's constitutional challenge to CPLR 2308.)

The Commissioner of Investigation has failed to establish that he has the authority to confer any type of immunity. It follows that he may not compel respondents to surrender their constitutional privilege against self-incrimination, either by threat of job forfeiture or by threat of this court's contempt power.

The commissioner raises the novel suggestion that he should be permitted to compel incriminating testimony from respondents notwithstanding his inability to confer immunity. He reasons that, in practical operation "use immunity" is *acquired* more than granted. That is, a witness who gives self-incriminating testimony under duress (e.g., under threat of job forfeiture) without being granted "use immunity" will automatically acquire such immunity by operation of the Fifth and Fourteenth Amendments (see, e.g., Adams v. Maryland, 347 U. S. 179, 181). Therefore, the commissioner argues, respondents are automatically afforded all the protection they are entitled to even if there is no specific grant of immunity.

The great constitution privilege was intended to protect the individual against coerced incriminating statements (see, e.g., Garrity v. New Jersey, supra).

In the usual case, a court is called upon to preserve the constitutional protection "after the fact," that is, after a statement has been obtained illegally or under conditions of duress and coercion. The court does so by barring the use of such improperly obtained testimony, or its fruits, in any criminal proceeding against the witness.

In this case, however, the court's protection has been sought "before the fact," before the coerced testimony has been elicited. What the commissioner appears to be suggesting is that this court aid in the coercion and contribute to the effort to induce respondents to surrender their right

to silence—by use of its contempt power—in anticipation of the protection the court will eventually afford respondents because of the coercive taint to any incriminating testimony. Even assuming, arguendo, that "use immunity" is all that respondents are here entitled to, the commissioner's suggestion that this court participate in a circumvention of constitutional mandates is entirely unacceptable. (Equally unacceptable, of course, is the evident attempt to secure the court's aid in circumvention of section 619-c of the Code of Criminal Procedure.)

It is clear that not only must the court decline to exercise its contempt power herein, but the court must accede to respondents' request for protection against continued violation of their constitutional rights by quashing the instant subpoenas.

To be sure, the inability of the City Investigations Commissioner to compel respondents to give incriminating testimony (because of his lack of authority to grant immunity), does not mandate the frustration of valid inquisitory proceedings with regard to this serious matter. Undoubtedly, local prosecutors and/or appropriate grand juries have the authority for testimonial compulsion that the commissioner lacks. Recent events have demonstrated the wisdom and success of close cooperation between all law enforcement agencies at the local, state and federal level. It is to be expected that the Commissioner of Investigations will so cooperate in this matter and make available to the appropriate agencies the information his investigation has already uncovered.

Accordingly, the principal motion is denied, and respondents' cross-motion is granted.

Settle order.

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RESPONDENTS' REPLY TO PETITIONERS' SUPPLEMENTAL BRIEF

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RESPONDENTS' REPLY TO PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 24 (5) of the Rules of this Court, petitioners have filed a supplemental brief in which they invite the attention of the Court to a recent decision of the New York State Supreme Court in Special Term, Part I, New York County, entitled *In Re Ruskin (Engelhardt)*, New York Law Journal, October 1, 1970, p. 2. Evidently petitioners submitted their supplemental brief in the belief that this Court would find the *Ruskin* decision helpful in deciding whether or not to grant their petition for a writ of certiorari.

The *Ruskin* case, however, unlike this one did not involve the question of a public employer's right to dismiss employees, after proper proceedings, who refused to answer questions specifically, directly and narrowly relating to the performance of their official duties. Rather, in *Ruskin*, the New York City Commissioner of Investigation sought an order pursuant to Section 2308 of the New York Civil Practice Law and Rules directing that a warrant be issued